Tey Chan & Anor v South East Asia Insurance Bhd

HIGH COURT (MUAR) — CIVIL SUIT NO 25–118 OF 1987
RICHARD TALALLA J
27 OCTOBER 1991

Evidence *— Documentary evidence — Police report made by car driver — Maker of statement dead — Whether report inadmissible under s 73A(3) of the Evidence Act 1950 as it was made by an interested person — Whether there was conflict between ss 32(c) and 73A(3) — Evidence Act 1950 ss 32(c) & 73A(3)*

Damages *— Personal injury — Leg injuries — Scars*

Damages *— Personal injuries — Loss of earnings — Deduction for living expenses — Civil Law Act 1956 s 28A*

The first plaintiff was riding a motor cycle with the second plaintiff as the pillion rider when they met with an accident with the driver of a motor car, now deceased. The defendant was the insurer of the motor car. It was not disputed that the collision occurred along a straight stretch of road and that the two vehicles were travelling in opposite directions. The first plaintiff's evidence was corroborated by a police report he had made more than a month after the accident, as prior to that, he was laid up in hospital. The driver of the motor car lodged a report on the day of the accident itself. Both police reports were admitted in evidence and formal proof of them was dispensed with. However, the makers of the report were required to be made available for cross-examination thereon. Counsel for the plaintiff submitted that the report was admissible under s 32(c) of the Evidence Act 1950 ('the Act'). However, the defence counsel argued that: (i) the driver's police report should be disregarded as he, the maker, being dead, the report was not proved in evidence; and (ii) although the report was admissible under s 32(c) of the Act, any statement made by an interested person was inadmissible under s 73A(3) and there was a conflict between ss 32(c) and 73A(3).

Held, allowing the plaintiffs' claim:

(1) There was no evidence to contradict the first plaintiff's story, nor was there any reason to disbelieve him. He gave his evidence in a simple, straightforward manner and was steadfast in cross-examination. The police sketch plan showing the fallen motor cycle corroborated his story.

(2) The motor car driver's police report was admissible in evidence by admission, it being stated in Pt II of the bundle of documents that formal proof of it was dispensed with. Furthermore, although it is true that the maker of the report should be available for cross-examination, it was known that at the time, the maker was dead. In any event, the police report was admissible under s 32(c) of the Act as conceded by the defence.

(3) There was no conflict between ss 32(c) and 73A(3) of the Act. For the police report to be rendered inadmissible under s 73A(3), there had to be evidence establishing that there were civil proceedings pending when the police report was made, or alternatively, there had to be evidence that civil proceedings were anticipated when the statement was made. There was no such evidence.

(4) The driver's police report being prima facie admissible in evidence, the defendant had to establish a case for inadmissibility under s 73A(3), in particular that the statement was made by the driver in anticipation of legal proceedings. The defendant failed to do so.

(5) As to general damages, the court allowed RM2,5000 and RM4,000 to the first and second plaintiffs respectively for the scars and RM30,000 and RM25,000 respectively for the leg injury.

(6) As to loss of earnings, the living expenses to be deducted under s 28A(1)(c) of the Civil Law Act 1956 were not the whole of the plaintiffs' expenses of living but the expenses reasonably incurred by them in earning their living, such as the extra cost of having meals and refreshment while at work, which cost would not ordinarily have been incurred had they stayed at home. Accordingly the first plaintiff's deductible living expenses were RM200 while the second plaintiff's were RM100 per month.

(7) The first plaintiff's income being RM1,000 per month, pre-trial total loss of earnings was awarded for 60 months at RM800 per month; pre-trial partial loss of earnings for 22 months at RM600 per month; and post-trial partial loss of future earnings for 38 months at RM500 per month.

(8) As the second plaintiff was unable to work as a result of the accident and his income being RM500 per month, pre-trial total loss of earnings was awarded for 82½ months at RM400 per month; post-trial future loss of earnings at the same rate for 67½ months; and the cost of domestic help for a recuperation period of 12 months at RM200 per month. There was no award for nursing care.

(9) In respect of both plaintiffs, interest on general damages at the rate of 8%pa from the date of service of the writ to the date of judgment, and interest on special damages at 4%pa from the date of the accident to the date of judgment was allowed. No interest was allowed for loss of future earnings.

[Bahasa Malaysia summary

Plaintif pertama sedang menunggang sebuah motosikal dengan plaintif kedua sebagai pemboncengnya apabila mereka telah mengalami suatu kemalangan dengan pemandu sebuah motokar, yang kini telah meninggal dunia. Defendan adalah syarikat insurans motokar itu. Adalah tidak dipertikaikan bahawa perlanggaran itu telah berlaku pada bahagian jalan yang lurus dan kedua-dua kenderaan tersebut sedang berjalan dalam arah yang bertentangan. Keterangan plaintif

pertama disokong oleh laporan polis yang telah dibuatnya lebih daripada sebulan selepas kemalangan tersebut, kerana sebelum itu, beliau berada di hospital. Pemandu motokar itu telah membuat suatu laporan polis pada hari kemalangan itu juga. Kedua-dua laporan polis telah diterima sebagai keterangan dan bukti rasmi tentangnya telah diabaikan. Bagaimanapun, pembuat laporan itu dikehendaki hadir untuk diperiksa balas berkenaan dengannya. Peguambela pihak plaintif menghujahkan bahawa laporan pemandu motokar itu boleh diterima di bawah s 32(c) Akta Keterangan 1950 ('Akta itu'). Akan tetapi, peguambela pihak defendan menghujahkan bahawa: (i) laporan pemandu motokar itu tidak harus diendahkan kerana beliau, sebagai pembuat laporan itu, telah meninggal; dan (ii) walaupun laporan itu boleh diterima di bawah s 32(c) Akta itu, sebarang kenyataan yang dibuat oleh seseorang yang mempunyai kepentingan tidak boleh diterima di bawah s 73A(3) dan terdapat suatu percanggahan di antara ss 32(c) dan 73A(3).

Diputuskan, membenarkan tuntutan plaintif:

(1) Tidak ada keterangan yang menyangkal cerita plaintif pertama, dan tidak ada sebarang sebab untuk tidak mempercayainya. Beliau telah memberi keterangan dengan ringkas dan terus terang dan tabah bila diperiksa balas. Pelan lakaran polis yang menunjukkan motosikal yang terjatuh menyokong ceritanya.

(2) Laporan polis pemandu motokar itu boleh diterima sebagai keterangan melalui pengakuan, kerana dinyatakan di dalam Bah II ikatan dokumen bahawa bukti rasmi berkenaan dengannya diabaikan. Lebih-lebih lagi, walaupun benar bahawa pembuat laporan itu sepatutnya hadir untuk diperiksa balas, adalah diketahui bahawa pada masa itu, pembuatnya telah meninggal dunia. Bagaimanapun, laporan polis itu boleh diterima di bawah s 32(c) Akta itu seperti yang diakui oleh pihak pembela.

(3) Tidak ada percanggahan di antara ss 32(c) dan 73A(3) Akta itu. Untuk laporan polis itu dijadikan tidak boleh diterima, mesti terdapat keterangan yang menunjukkan bahawa terdapat prosiding sivil yang belum selesai apabila laporan polis itu dibuat, atau secara alternatif, mesti terdapat keterangan bahawa prosiding sivil dijangkakan apabila kenyataan itu dibuat. Tidak ada keterangan sebegitu.

(4) Oleh kerana laporan polis pemandu prima facie boleh diterima, defendan perlu menunjukkan suatu kes untuk ketidakboleh terimaan di bawah s 73A(3), terutamanya bahawa kenyataan itu telah dibuat oleh pemandu itu kerana menjangka prosiding undang-undang. Defendan gagal berbuat demikian.

(5) Berkenaan dengan ganti rugi am, mahkamah membenarkan RM2,500 dan RM4,000 kepada plaintif pertama dan kedua masing-masing untuk parut dan RM30,000 dan RM25,000 masing-masing untuk kecederaan kaki.

(6) Berkenaan dengan kehilangan mata pencarian, perbelanjaan hidup yang kena ditolak di bawah s 28A(1)(c) Akta Undang-Undang

Sivil 1956 tidak merupakan kesemua perbelanjaan hidup plaintif tetapi perbelanjaan yang munasabahnya ditanggung untuk menyara hidup, seperti kos tambahan untuk makanan dan minuman semasa bekerja, iaitu kos yang tidak akan ditanggung jika mereka tinggal di rumah. Dengan demikian, perbelanjaan hidup yang akan ditolak daripada plaintif pertama adalah RM200 sementara perbelanjaan hidup yang akan ditolak daripada plaintif kedua ialah RM100.

(7) Memandangkan pendapatan plaintif pertama adalah RM1,000 sebulan, kehilangan sepenuh mata pencarian sebelum perbicaraan selama 60 bulan pada RM800 sebulan; kehilangan sebahagian mata pencarian sebelum perbicaraan selama 22 bulan pada RM600; dan kehilangan sebahagian mata pencarian selepas perbicaraan selama 38 bulan pada RM500 sebulan telah diawardkan.

(8) Oleh kerana plaintif kedua tidak boleh bekerja akibat kemalangan itu dan pendapatannya adalah RM500 sebulan, kehilangan sepenuh mata pencarian sebelum perbicaraan selama 82½ bulan pada RM400 sebulan; kehilangan sepenuh mata pencarian selepas perbicaraan pada kadar yang sama selama 67½ bulan; dan kos pembantu rumah untuk tempoh pemulihan selama 12 bulan pada RM200 sebulan telah diawardkan. Tidak ada award untuk jagaan kejururawatan.

(9) Faedah ke atas ganti rugi am pada kadar 8% setahun dari tarikh penyampaian writ sehingga tarikh penghakiman, dan faedah ke atas ganti rugi khas pada kadar 4% setahun dari tarikh kemalangan sehingga tarikh penghakiman dibenarkan kepada kedua-dua plaintif. Tidak ada faedah yang dibenarkan ke atas kehilangan mata pencarian pada masa akan datang.]

[*Editorial Note*: The defendant's appeal to the Supreme Court vide Civil Appeal No 02–503–91 was heard on 13 September 1993. The court (comprising Abdul Hamid Omar LP, Mohamed Azmi and Mohamed Dzaiddin SCJJ) dismissed the appeal and upheld the decision of the High Court.]

Notes

For cases on damages for personal injuries, see 1 *Mallal's Digest* (4th Ed) paras 1821–1825; 6 *Mallal's Digest* (4th Ed) paras 328–567.

For a case proof of documentary evidence by the maker, see 7 *Mallal's Digest* (4th Ed) para 608.

Cases referred to

1 *Robinson v Stern* [1939] 2 KB 260; [1939] 2 All ER 683 (refd)

2 *Jarman v Lambert & Cooke (Contractors) Ltd* [1951] 2 All ER 255; [1951] 2 KB 937 (folld)

3 *Whitelocke v Baker* (1807) 13 Ves 510 (refd)

4 *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174; [1979] 2 All ER 910; [1979] 3 WLR 44 (refd)

5 *Dews v National Coal Board* [1987] 2 All ER 545; [1988] AC 1; [1987] QB 81 (refd) A

Legislation referred to
Evidence Act 1950, ss 32(c), 73A(1), (3)

E Ramasamy (*E Ramasamy & Co*) for the plaintiffs. B
Mabel Sabastian (*Manjit Singh Dhillon*) for the defendant.

Richard Talalla J: In this running down action the following facts are admitted, namely, that the first plaintiff was the rider of a motor cycle, the second plaintiff the pillion rider thereof, one Er Chong Beng was the owner C and driver of a motor car, Er Chong Beng is now deceased, the defendant was the insurer of the motor car and that on 18 October 1984 at about 6.40pm the first plaintiff was riding the motor cycle with the second plaintiff as pillion rider along Batu 16, Jalan Sengkang, Bukit Gambir, Muar when a collision occurred between the motor cycle and the motor car.

It was not in dispute that the collision occurred at a point along a straight D stretch of road when the motor cycle was being ridden in the direction of Sengkang and the motor car was travelling in the opposite direction. A police sketch plan and key showed the road to be 20ft wide. It also depicted a motor cycle lying on side table to the left of the right of way to Sengkang and this too was not in dispute. E

The first plaintiff testified that at the time of the accident he was riding about 2ft from the left edge of the road and that the motor car encroached into his path and collided into him. His evidence was a corroboration of the facts alleged in a police report he made on 28 November 1984. There were no witnesses for the defence but counsel for the defendant sought to argue by reference to the first plaintiff's own evidence that the first plaintiff was F not 2ft from the left edge of the road as he claimed but that he was close to the centre white line which explained why when he saw the motor car 30ft away and tried to swerve to the left the collision took place, not on the left side table as it should have if the first plaintiff was riding 2ft from the edge of the road as he testified, but on the left side of the road itself thus pointing G to the fact that the first plaintiff was close to the centre white line when the collision took place. I disagree. I could find no evidence to contradict the first plaintiff's story that he was travelling about 2ft from the left edge of the road. There was no reason for me to disbelieve him. He gave his evidence in a simple straightforward manner and was steadfast in cross-examination. The police sketch plan showing the fallen motor cycle on the table H corroborates his story.

The driver of the motor car also made a police report. He lodged it on the day of the accident itself but the first plaintiff did so only on 28 November 1984 as abovestated, apparently because he was laid up in hospital for that duration. I

Both police reports were admitted in evidence, formal proof of them was dispensed with, but the makers of the reports were required to be made available for cross-examination thereon. The first plaintiff spoke in evidence

to his having made his report and of course he was open to cross-examination and he was in fact, so cross-examined.

Defence counsel however sought to argue that I should disregard the driver's police report because he, the maker, being dead, the report was not proved in evidence.

Counsel for the plaintiff submitted that the report was admissible under s 32(c) of the Evidence Act 1950 ('the Act'). Counsel for the defendant on the other hand relied for support on s 73A(3) of the Act. The two subsections read as follows:

> 32 Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> ...
>
> (c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
>
> ...
>
> 73A(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

Counsel for the defendant conceded that the report was admissible under s 32(c) of the Act but claimed its inadmissibility under the latter subsection and conflict between the two provisions.

The view I took was that the police report of the driver was admissible in evidence by admission, it being stated in Pt II of the bundle of documents that formal proof of it was dispensed with. It is true that there was a requirement that the maker be made available for cross-examination but by the same token it was known, and admittedly known, at the time, that the maker was dead. In any event, to my mind, the police report was admissible under s 32(c) of the Act, as conceded aforesaid. I did not accept that the police report was inadmissible under s 73A(3) of the Act. Counsel for the defendant argued that the various sections of the Act should be read together, in particular in this case ss 32(c) and 73A(3). I agreed and did read them together. Counsel for the defendant invited a construction of the provisions which pointed to conflict. I did not accept that construction. I could see no conflict between the two subsections. As I saw it, the word 'statement' in the latter subsection is qualified by the words 'made ... at a time when proceedings were pending or anticipated ...'. By reference to s 73A(1) the proceedings are civil proceedings. Thus, for the police report to be rendered inadmissible under s 73A(3) there had to be evidence establishing that there were civil proceedings pending when the police report was made. There was no such evidence. Alternatively, there had to be evidence that civil proceedings were anticipated when the statement was

made. Again there was no such evidence. Accordingly, it could not be held that the police report was inadmissible under s 73A(3) of the Act. A

Section 73A is in pari materia with s 1(3) of the English Evidence Act 1938. Turning to the word 'anticipated' appearing in the subsection, that word has been the subject of judicial interpretation.

In *Robinson v Stern*,[1] the defendant driver of a motor vehicle had collided into a child and at once proceeded to a police station where she made a statement upon the usual police form which commenced with the usual caution. This statement was held at first instance to be admissible in evidence. However on appeal it was held that the statement was inadmissible because at the time it was made, proceedings were anticipated involving a dispute as to the fact referred to therein. This case however was distinguished by the same court, the English Court of Appeal, in *Jarman v Lambert & Cooke (Contractors) Ltd.*[2] There, the Master of the Rolls said that the short question which the court had to determine was whether, in truth, proceedings were 'anticipated'. In this regard, he referred to the speech of Lord Eldon LC in *Whitelocke v Baker*[3] at p 514 in regard to the admission of documentary evidence that such documents '... are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth'. B C D

The learned Master of the Rolls went on to say at p 258 that:

> Plainly, in all such cases where that essential question is put to the court, the court has to answer at a later date what was the state of mind of the relevant person at the former date, viz when the statement was made. All that I have just said leads to this observation, which I think is pertinent. I think that the court is entitled to come to its conclusion on the facts on the past date, paying due regard, though not more than due regard, to the facts as they have occurred since — particularly, by way of example, if it appears afterwards that the claim was from the start a perfectly genuine one. In that case, it may throw some light on the problem presented: Were proceedings anticipated when that claim, now known to be genuine, was originally made? E F

In the same case Denning LJ (as he then was) at p 261 said:

> To exclude this document, it is not sufficient for the defendants to say that proceedings might have been, or ought to have been, anticipated. They must go further and show that proceedings were, in fact, anticipated. Anticipation is a state of mind whereby someone considers that something is likely to happen. There must be a likelihood of the thing happening. Someone must consider it likely that proceedings will take place, and that someone must ordinarily be the person who makes the statement, for it is his state of mind which is material. His statement is to be excluded if he is a person interested and makes it with a view to proceedings. If his state of mind is such that he says to himself: 'It looks to me as if this will end up in court. I must be careful what I say,' then proceedings are anticipated and the statement is inadmissible. G H

In the present case, the driver's police report being prima facie admissible in evidence for the reasons abovestated, it fell to the defendant to establish a case for inadmissibility under s 73A(3), in particular to show that the statement was made by the driver in anticipation of legal proceedings. The I

defendant failed to do so. I therefore held the police report to be admissible in evidence.

The driver of the motor car in his police report which he made a little more than two hours after the accident said that when he arrived at the said Batu 16 there were two cyclists riding abreast, that he swerved to the right, that there was a motor cycle coming from the front, that the right side of his motor car was in collision and the motor cycle fell. Marrying the first plaintiff's uncontradicted evidence that the motor car was 30ft ahead of him when it encroached onto his side of the road and that he tried to avoid the motor car by swerving to the left, to my mind, the driver of the motor car was wholly liable in negligence for the collision and I so hold. Quite simply he executed a dangerous act. He overtook smack in the face of the oncoming motor cycle. He did so in circumstances enabling the motor cyclist to do nothing apart from what he did or tried to do but unfortunately for the plaintiffs, unsuccessfully.

As to damages claimed by the first plaintiff, the special damages were agreed at RM1,200 and accordingly I allow the same. As to general damages, having considered the case law cited by both counsel and given the matter due consideration, I allowed RM2,5000 for the multiple scars and RM30,000 for the leg injury. As to loss of earnings, the view I take is that the living expenses to be deducted under s 28A(1)(c) of the Civil Law Act 1956 are not the whole of the first plaintiff's expenses of living but the expenses reasonably incurred by him in earning his living, such as the extra cost of having his meals and refreshment while at work, which cost would not ordinarily have been incurred had he stayed at home. To hold otherwise and deduct the whole of the living expenses will, to my mind, give a meaning to the words 'living expenses' in the said section which can lead to absurd and unjust consequences and which, it would seem, could not have been what the Parliament had in mind when it enacted the legislation. Support for this view is found in *Lim Poh Choo v Camden and Islington Area Health Authority*[4] at p 921 and *Dews v National Coal Board*[5] at pp 548 and 549.

Accordingly, I find the first plaintiff's deductible living expenses to be RM200. The defence conceded to his income being RM1,000 per month. I therefore allow total loss of earnings for 60 months at RM800 per month. For the period thereafter, for a further 22 months till 2 September 1991, pre-trial loss of RM600 per month is allowed, the total being RM13,200. Lastly, a sum of RM19,000 is awarded for partial loss of future earnings at RM500 per month for 38 months.

As to damages claimed by the second plaintiff, the special damages were agreed at RM700 and accordingly I allow the same. As to general damages, again having given all matters due consideration including the case law cited, I allow RM4,000 for the scars and RM25,000 for the leg injury (both injuries). As to the claim for loss of earnings, I find the second plaintiff's deductible living expenses to be RM100 per month. The defence conceded that the second plaintiff's earnings were RM500 per month prior to the accident. Therefore, the past loss of earnings for 82½ months, defence counsel having conceded that the second plaintiff was unable to work as a

result of the accident, at RM400 per month is allowed at RM33,000. Future loss of earnings at the same rate for 67½ months is allowed at RM27,000. This plaintiff is also allowed the cost of domestic help for a recuperation period of 12 months at RM200 per month totalling RM2,400. There is no award for nursing care.

In respect of both plaintiffs, interest on general damages at the rate of 8%pa from 19 October 1987, being the date of service of the writ, to the date of judgment is allowed as is interest on the special damages at 4%pa from 18 October 1984, the date of the accident, to the date of judgment. There is no interest allowed on the award for loss of future earnings. The defendant is ordered to pay the plaintiffs' costs of the action to be taxed.

Order accordingly.

Reported by Anne Khoo